

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

The State of Texas, et al.,

Plaintiffs,

v.

Google LLC,

Defendant.

Case No. 4:20-cv-00957-SDJ

Hon. Sean D. Jordan

**PLAINTIFF STATES' REPLY IN SUPPORT OF THEIR MOTION TO AMEND THE
ORDER APPOINTING SPECIAL MASTER**

INTRODUCTION

Parties in complex litigation routinely agree to have a special master resolve voluminous pretrial matters such as discovery disputes, deposition designation objections, and exhibit list objections. Google not only refuses to agree, but argues that its consent is necessary. Not so. As the Motion explained, under Rule 53(a)(1)(C) this Court can empower Special Master Moran to resolve pretrial matters without consent. Google’s principal response is to assert, in what comes as news to most litigators, that deposition designations and exhibit list objections are *trial proceedings*, not pretrial matters. That argument is self-evidently wrong and has no legal support. Google also half-heartedly reprises its argument that the case does not warrant attention from a special master. Back in December of 2023, Google argued a special master would not be “helpful,” but rather “a huge inefficiency,” Ex. 1 (Dec. 14, 2023 Hr’g Tr.) at 25-26; in January of 2024, Google again argued “[t]here is no need for the appointment of a Special Master,” Dkt. 197 at 2. The argument failed then and should fail again. Any such argument is directed to this Court’s discretion. If the Court agrees with Plaintiff States’s prediction that Google will continue to bury the Court in a high volume of pretrial issues, then it should enlist the assistance of Special Master Moran to decide disputes in the first instance, with the backstop of *de novo* review in this Court.

ARGUMENT

I. The Matters at Issue Here Are Pretrial Issues.

Each of Google’s arguments is self-defeating. It first argues from dictionary definitions, invoking Merriam-Webster’s definition of “pretrial” as “occurring or existing *before* a trial.” Dkt. 819 at 2. Just so. Each and every issue proposed to be delegated to the Special Master will occur or exist before trial. Likely for that reason, Black’s Law Dictionary and Merriam-Webster both

define a “motion in limine” as a “pretrial” matter.¹ The same is true of deposition designation and exhibit list objections, which are governed by Fed. R. Civ. P. 26(a)(3)(B), a rule which by its terms applies to “pretrial disclosures” which “must be made at least 30 days *before* trial” and pretrial “objections,” which must be served “14 days after” that.

Next, Google argues that “pretrial” under Rule 53 means the same thing as “pretrial” under 28 U.S.C. § 636(b)(1), which addresses the powers of magistrate judges. Dkt. 819 at 2 & n.4. That equivalence strongly supports Plaintiff States’ Motion, since magistrate judges often resolve motions in limine² and deposition designation and exhibit list objections,³ under the authority of that provision. Indeed, § 636(b)(1)(A) includes a list of pretrial matters that magistrate judges presumptively should *not* resolve (such as motions “for summary judgment”), which does not list motions in limine, exhibit list objections, deposition designation objections, or anything like that, confirming the common-sense view that these are pretrial issues that magistrates (or special masters) can resolve. By contrast, the section addressing *trial* is in § 636(c)(1), which requires

¹ See *Motion in Limine*, Black’s Law Dictionary (12th ed. 2024) (“[a] **pretrial** request that certain inadmissible evidence not be referred to or offered at trial.” (emphasis added)); *Motion in Limine*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/motion#legalDictionary> (“a usually **pretrial** motion that requests the court to issue an interlocutory order which prevents an opposing party from introducing or referring to potentially irrelevant, prejudicial, or otherwise generally inadmissible evidence until the court has finally ruled on its admissibility” (emphasis added)).

² E.g., *Anton v. SBC Glob. Servs., Inc.*, No. CIV. 01-40098, 2007 WL 1500171, at *1 (E.D. Mich. May 22, 2007) (finding that the “Magistrate Judge’s” ruling on a “motion in limine” was “governed by the terms of 28 U.S.C. § 636(b)(1)(A)”); *Jesselson v. Outlet Assocs. of Williamsburg, Ltd. P’ship*, 784 F. Supp. 1223, 1228 (E.D. Va. 1991) (finding that § 636(b)(1)(A) applied because “[a]dvance rulings on the admissibility of evidence are allowed at final pretrial conferences”).

³ E.g., *EEOC v. BOK Fin. Corp.*, No. CIV 11-1132 RB/LAM, 2014 WL 11636149, at *1 (D.N.M. May 6, 2014) (magistrate judge resolved “contested exhibits and designations of deposition testimony pursuant to 28 U.S.C. § 636(b)(1)(A)”); *AG Equip. Co. v. AIG Life Ins. Co.*, No. 07-CV-0556-CVE-PJC, 2009 WL 414046, at *2 (N.D. Okla. Feb. 18, 2009) (deposition designation objections resolved by magistrate judge under § 636(b)(1)).

consent and allows conducting a jury trial and the entry of judgment, with *de novo* review under Rule 72(b). *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 72(a)-(b).

Google cites no cases in which a court held that § 636(c) applied to motions in limine, exhibit list objections, or deposition designation objections. Google cites *Beazer East, Inc. v. Mead Corp.*, where the magistrate judge’s ruling determined “equitable apportionment” of CERCLA liability, which was “one of the ultimate issues to be tried.” 412 F.3d 429, 438-39 (3d Cir. 2005). The key point from *Beazer* is that “the nature of decision” namely, whether it “required the decisionmaker to resolve factual disputes going to the ultimate issues in the case.” *Id.* at 439-40. That matches the line drawn by Rule 72 between “nondispositive matters” (72(a)) and “dispositive motions” (72(b)), which also tracks the distinction between § 636(b) (with its enumerated list) and § 636(c). The issues here are nondispositive pretrial matters. The Supreme Court case *La Buy v. Howes Leather Co.* has no relevance here. 352 U.S. 249 (1957). There, the district court referred two *entire cases* for trial before a special master as the factfinder. *Id.* at 250. That is clearly improper. Having a special master decide preliminary evidentiary issues is not.

The fundamental mistake in Google’s argument is that it assumes that Special Master Moran would be deciding “what evidence will be admitted *at trial*.” Dkt. 819 at 2. That is not true. A ruling on a motion in limine or other objection does not result in the *admission* of any evidence into the trial record. It simply resolves—as a preliminary matter—certain objections made by the other party against the admission of that evidence. Even after a pretrial ruling, the party will need to move *at trial* for the admission of that evidence. That is why, “without a contemporaneous objection, a standing motion in limine is insufficient to preserve a point of error.” *United States v. Powell*, 732 F.3d 361, 378 n.16 (5th Cir. 2013). This principle is rooted in the notion that pretrial rulings are preliminary until the trial ruling: “[t]he rationale for requiring either

a renewed objection at trial, or an offer of proof, is to allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial.” *Id.* (alteration in original) (quoting *United States v. Graves*, 5 F.3d 1546, 1552 (5th Cir. 1993)).

II. Google’s Consent Is Not Needed.

While consent is rarely withheld, it is not necessary under the plain text of Rule 53. Google does not dispute this, instead chiefly arguing that there are few published cases addressing this situation. That is true, but the rarity of objections to the appointment of a special master should not change the Rule 53 analysis, and in any event even Google admits that *Allscripts Healthcare, LLC v. Andor Health, LLC* did what Plaintiff States propose. No. 21-704-MAK, 2022 WL 2254358 (D. Del. June 21, 2022). There is little benefit in reserving the question until Google raises “over 800” evidentiary disputes, Dkt. 819 at 6 (quoting *Allscripts Healthcare*, ECF No. 655 (D. Del. Aug. 9, 2022)), since that may cause delay during a critical pretrial period when the focus should be on preparing for trial rather than procedural fights.

III. Rule 53(a)(1)(C) Is Fully Satisfied.

This Court is well-positioned to decide whether the pretrial matters in this case “cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” Dkt. 819 at 6 (quoting Fed. R. Civ. Proc. 53(a)(1)(C)). Plaintiff States submit that the profound complexity and volume of this case—in combination with this Court’s substantial preexisting caseload and Google’s litigation tactics—more than warrant the assistance of Special Master Moran. Further, Special Master Moran already knows the case and has the context of prior discovery fights. But there can be no doubt that the answer to this question is entrusted to this Court’s discretion.

Last, Google threatens that empowering Special Master Moran “would not save the time that Plaintiffs suggest it would” because it would merely “add[] two layers of decision” since “the

Court [would] rule on *all* objections de novo.” Dkt. 819 at 8-9. It is of course true that Google could waste the Court’s time by appealing each and every ruling to the Court for *de novo* review. However, Google is unlikely to be so obstructionist—after all, it has not appealed every ruling from the Special Master thus far, despite the same theoretical ability. The fact is, Special Master Moran’s first-pass rulings on voluminous evidentiary issues will be sound, and the parties are likely to accept his rulings, except on key, targeted issues. That will save quite a bit of time.

CONCLUSION

The Court should amend the Order Appointing Special Master to permit Special Master Moran to resolve certain pretrial matters.

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Respectfully submitted,

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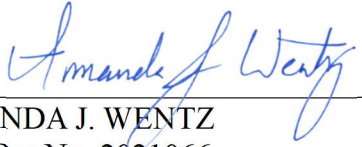
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**** FILED UNDER SEAL ****

CERTIFICATE OF SERVICE

I certify that on March 10, 2025, this document was filed electronically in compliance with Local Rule CV-5(a) and served on all counsel who have consented to electronic service, per Local Rule CV-5(a)(3)(A).

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